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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 910

ERNEST EDWIN STONE

Petitioner

vs.

STATE OF NORTH DAKOTA AND J. D. WOODLEY, WARDEN OF THE STATE PENITENTIARY, BISMARCK, NORTH DAKOTA

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH DAKOTA

JOHN P. DOSLAND
Box 539
Moorhead, Minnesota 56560
Attorney for Petitioner

333-3539 Hayward-Court Brief Prtg. Co., Mpls., Minn. 55415 333-3539

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In the Supreme Court of the United States

ERNEST EDWIN STONE

Petitioner

VS.

STATE OF NORTH DAKOTA AND J. D. WOODLEY, WARDEN OF THE STATE PENITENTIARY, BISMARCK, NORTH DAKOTA

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH DAKOTA

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, Ernest Edwin Stone, prays that a writ of certiorari issue to review the judgment of the Supreme Court of North Dakota rendered and entered against the petitioner on the 25th day of September, 1969. The opinion upon which this judgment is based is dated September 25, 1969. The opinion has not been officially reported but has been reported in 171 N.W. 2d 119. Pursuant to this opinion a minute order was entered in the docket book quashing the writ. Copies of the opinion are attached.

JURISDICTION OF THIS COURT

The petitioner relies upon the provisions of Amendments V, VI, and XIV to the United States Constitution which preserves for him the privilege against compulsory self-

incrimination, the right to trial by jury, the right to be informed of the nature and cause of the accusation and to be confronted with the witnesses against him, and to have the assistance of counsel for his defense; and upon *28 U.S.C.A.*, Section 1257, Subdivision 3, to have writ of certiorari granted, and to sustain the jurisdiction of this court.

QUESTION PRESENTED FOR REVIEW

Acceptance of Plea of Guilty

Did the petitioner intelligently and understandingly enter his plea of guilty, without the assistance of counsel, where the record shows that, at the same proceeding, he made statements, under oath, inconsistent with such a plea?

Waiver of Right to Counsel

Did the petitioner, by rejecting the trial court's offer of the assistance of counsel and by pleading guilty, make an intelligent and understanding waiver of the right to counsel, where the record shows that the court made only a cursory examination of the petitioner's professed waiver and where the accused in the same proceedings made statements, under oath, inconsistent with his plea?

CONSTITUTIONAL PROVISIONS

The first constitutional provision involved is Amendment V found in *U.S.C.A.*, Constitution, page 297, and as applicable here, reads as follows:

> "No person * * * shall be compelled in any criminal case to be a witness against himself * * *."

The second constitutional provision involved is Amend-

ment VI found in *U.S.C.A.*, Constitution, page 4. It reads as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

The third constitutional provision involved is Amendment XIV found in *U.S.C.A.*, Constitution, page 288, as applicable here, reads as follows:

> "* * * nor shall any state deprive any person of life, liberty, or property, without due process of law * * *."

A CONCISE STATEMENT OF THE CASE

On the 8th day of September, 1964, the petitioner was taken before the District Court for the County of McKenzie, State of North Dakota, charged with the crimes of (1) rape in the first degree and (2) assault with a deadly weapon with intent to kill under Sections 12-30-01, 12-30-04, 12-30-05 and 12-26-07 of the *North Dakota Century Code*. He was arraigned *without counsel*, and after ascertaining that the defendant was 39 years of age and had completed eight (8) years of education, the court instructed the defendant and made inquiry as appears in the North Dakota Supreme Court opinion (A., p. 12).

After this examination the court found that the petitioner had expressly waived his right to counsel, and after advising the defendant that he had 24 hours in which to con-

sider his plea, accepted his plea of guilty to rape in the first degree.

In addition the court, in regards to the crime of assault with a deadly weapon with intent to kill advised the defendant and made inquiry as appears in the North Dakota Supreme Court opinion (A., p. 14).

After making this examination of the defendant, the court found that he had expressly waived his right to counsel of the charge of assault with a deadly weapon with intent to kill and after advising the petitioner that he had 24 hours in which to consider his plea, accepted a plea of guilty to the second charge.

In the same proceeding the petitioner was called to testify (McKenzie County T., p. 38) *without being cautioned by the court,* and made statements wholly inconsistent with his pleas of guilty and which serve to show his confusion.

In regards to the crime of assault with intent to kill, it appeared (McKenzie Co. T., p. 50) that the petitioner apparently attacked the alleged victim, Mr. Fisher, with a pocket knife after an argument of some nature. The petitioner at that time stated that he did not know why he did this, which is in effect denying knowledge of his intent. On page 51 of the transcript he stated that he didn't remember whether he stabbed the victim after the initial event. The only statements made by the petitioner relating to the question of "intent to kill" are found on page 51. There, in the space of three questions, the petitioner's obvious lack of understanding is shown.

> "Q. Do you remember thinking that you had killed Fisher?
>
> A. *No, it didn't enter my mind.*" (Emphasis added.)

"Q. Did you take for granted that he was dead?
A. I took for granted he was dead.
Q. You thought you had killed him?
A. *I thought I had killed him.*" (Emphasis added.)

The questioning in regards to the crime of rape in the first degree, first appear on page 54 of the transcript where, the petitioner denies having any knowledge of, and is unable to remember any sexual penetration which is an essential element of the crime of rape in North Dakota.

"Q. When you first tried, did you try to put your penis in?
A. I did.
Q. And did you make partial insertion?
A. Just partial.
Q. Do you have any idea of how far?
A. No, I don't remember, but the doctor said that I did get the head of it in.
Q. Now, you know that to be a fact?
A. Well, that's what the doctor told me.
Q. *Well, you yourself.*" (Emphasis added.)
"A. *I don't know.*" (Emphasis added.)

The petitioner's confusion is further shown on page 55 where he then admits making a penetration, however, after being confronted with a statement taken previously from him, he, in effect, denied the truth of the statement and advised that he was only stating what he thought the examining doctor found. He again states that he has no independent recollection of making penetration.

"A. I remember Mr. Hilde said that the doctor said that I, I got it in so far—I don't remember how far it was, he said, and I said, 'Go ahead, put down

what the doctor said, he knew more about it, better than I would.'

Q. Do you know for sure, Mr. Stone, that you put your penis in Virginia's vagina?

A. *I remember trying but I don't remember whether I got it in.*" (Emphasis added.)

"Q. You do remember trying?

A. I remember trying.

Q. And you do remember blood on your hands?

A. I remember him telling me that the doctor said I tried or had part of it in. I said, '*I don't remember, but put down what the doctor said.*' " (Emphasis added.)

"The Court: You had your penis in against her private parts?

A. Yes.

The Court: Pressing?

A. I guess you'd call it, yes, sir.

The Court: All right."

HOW FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

The petitioner made application to the District Court of Burleigh County, North Dakota on the 18th day of February, 1969 for a Writ of Habeas Corpus and a Writ was issued returnable on the 24th day of February, 1969. After hearing, the Writ of Habeas Corpus was quashed on the 24th day of February, 1969, the District Judge stating that the Supreme Court of North Dakota had not as yet given the lower court guidelines or minimum standards to follow (Burleigh County T., p. 20).

The petitioner then made application to the Supreme Court of North Dakota for a Writ of Habeas Corpus on the 6th day of June, 1969, and the Writ was issued return-

able on the 25th day of June, 1969. By opinion dated September 25, 1969, the Supreme Court of North Dakota quashed the writ.

ARGUMENT

The questions presented for review are the effectiveness of the petitioner's waiver of the right to counsel and the question as to whether his guilty plea was voluntarily made. The same standard must be applied in determining both of these questions. *Boykin v. Alabama,* — U.S. —, 23 L. Ed. 2d 274, 89 S. Ct. — (1969). Various Federal Constitutional rights are involved and this Court has held that the question of an effective waiver of a Federal Constitutional right in a proceeding is governed by Federal standards. *Boykin v. Alabama, supra, Douglas v. Alabama,* 380 U.S. 415, 422, 13 L. Ed. 2d 934, 938, 85 S. Ct. 1074.

The North Dakota Supreme Court definitely did not apply Federal standards in considering this case. In its opinion (A., p. 16) the Supreme Court of North Dakota examines North Dakota statutes and states:

> "* * * Sections 29-01-06, 29-01-27, and 29-13-03, N.D.C.C., are legislative expressions of the guarantee to one accused of crime of the right to appear in person and with counsel. These legislative declarations set a minimum standard which should be followed in order to afford the defendant his right to counsel as guaranteed. *State v. Whiteman, supra, State v. O'-Neill,* 117 N.W. 2d 857 (N.D. 1962) * * *."

It is submitted that the North Dakota statutes cited and the North Dakota cases thereafter cited are not the proper tests for determining the effectiveness of a waiver of rights guaranteed by the United States Constitution.

In *Carnley v. Cochran*, 369 U.S. 506, 516, 8 L. Ed. 2d 70, 77, 82 S. Ct. 884, this Court held, when considering the problem of waiver of the right to counsel, that it could not be presumed from a silent record, and in addition held that the record must show that the accused not only was offered counsel, but that he intelligently and understandingly waived his right to counsel. However in that case the Court did not overrule the general principles of *Betts v. Brady*, 316 U.S. 455, 86 L. Ed. 1595, 62 S. Ct. 1252, despite vigorous concurring opinions that *Betts* should be overruled. *Gideon v. Wainwright*, 372 U.S. 335, 9 L. Ed. 2d 799, 83 S. Ct. 792, 93 *A.L.R.* 2d 733 (1963) specifically overruled *Betts v. Brady*, but did not specifically consider the question of waiver of counsel in state prosecution.

It is now clear from *Douglas v. Alabama, supra* and *Boykin v. Alabama, supra*, that the Federal Standards must be applied in determining the effectiveness of a waiver of the right to counsel. Likewise, it is also clear from *Boykin v. Alabama, supra*, that the same Federal standards must be applied in considering the other Federal constitutional rights that are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial.

We must then look to the long standing Federal standards to determine the effectiveness of a waiver of the right to counsel and to solve both of the questions raised for review in this case.

Von Moltke v. Gillies, 92 L. Ed. 309, 332 U.S. 708, sets forth the duty of the court and the information to be ascertained.

> "Fourth. We have said: 'The constitutional right of an accused to be represented by counsel invokes, of

itself, the protection of a trial court, in which the accused—whose life or liberty is at stake—is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused.' To discharge this duty properly in the light of the strong presumption against waiver of the constitutional right to counsel, a judge must investigate as long and as thoroughly as the circumstances of the case before him demand. *The fact that an accused may tell him that he is informed of this right to counsel, and desires to waive this right does not automatically end the judge's responsibility. To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all circumstances under which such a plea is tendered.*" (Emphasis added.) (92 L. Ed., pp. 320 & 321, 332 U.S., pp. 723 & 724.)

It is the contention of this petitioner that the questions asked by the trial court as set forth in the Statement of the Case is not a "penetrating and comprehensive examination of all circumstances under which such a plea is tendered." It is difficult to see how these questions could determine that there was "an intelligent and understanding" waiver by the accused.

Not only were the questions of the trial court insufficient to determine whether the waiver of counsel or the

plea of guilty was effective, intelligent and voluntary, but later events in the same proceedings, as set forth in the Statement of the Case, clearly show that the defendant did not understand the nature of the charges against him in that he apparently failed to grasp the meaning of "intent to kill" and to understand that sexual penetration is an essential element of the crime of rape. If a court cannot presume waiver from a silent record, it certainly cannot, when faced with an inconsistent record, find an effective waiver.

In addition, the record in the case at bar is "silent" and on many important points required by *Von Moltke, supra*, the petitioner was informed of the fact that he was charged with the crimes of rape in the first degree and assault with a deadly weapon with intent to kill, but he was not informed as to essential elements of these crimes (and therefore was not informed as to the true nature of the charges), nor was he informed as to the statutory offenses included within them. While he was advised of the minimum punishment allowable, he was never advised that the maximum punishment for the crime of rape in the first degree could be *LIFE IMPRISONMENT*. He was never informed as to possible defenses to the charges and circumstances in mitigation thereof.

As pointed out in *Boykin v. Alabama, supra*, a plea of guilty involves the waiver of several Federal constitutional rights. The questions of the trial court here concerned only the right to a trial by jury, and the right to counsel. The record is "silent" as to the petitioner's knowledge of the privilege against compulsory self-incrimination, the right to confront one's accusers, the right to compulsory process for obtaining witnesses in his favor, and

other rights guaranteed by the Federal Constitution. His knowledge cannot be presumed from a silent record, and, without knowledge he cannot understandingly, voluntarily and intelligently waive them.

The Supreme Court of North Dakota reviewed the return of the County Justice at Watford City, North Dakota (A., p. 9). The County Justice completed two of these forms entitled "Return to District Court". An examination reveals that these are either printed or mimeographed forms with various blank spaces for the County Justice to fill in certain information. The portion of these forms relied on, at least partially, by the Supreme Court of North Dakota in holding that petitioner's plea was voluntarily and understandingly made is the PRINTED portion. This form states that the County Justice informed the defendant of the nature of the charges against him, gave him a copy of the complaint and advised him of his right to counsel and to have witnesses called in his behalf. The remainder of the petitioner's constitutional rights are encompassed within the printed phrase "etc., etc." This is certainly not a "record" as contemplated by the Federal decisions. The use of the printed phrase, "etc., etc." is a rather cursory way of treating constitutional rights and that a State Supreme Court should rely, even partially, on such a document is unthinkable.

The petitioner is not suggesting that Rule 11 of the *Federal Rules of Criminal Procedure* be applied to state cases. *Halliday v. United States,* — U.S. —, 23 L. Ed. 2d 16, 89 S. Ct. —, held only that it is unnecessary to apply Rule 11 retroactively where there is ample evidence that the prosecution had met its burden of demonstrating that the petitioner entered his plea voluntarily with an understand-

ing of the nature of the charges against him. *Halliday* does not disturb the standards set forth in *Von Moltke.*

Petitioner's first petition for Habeas Corpus was directed to the District Court of Burleigh County, North Dakota. The District Judge presiding at the Habeas Corpus hearing expressed doubt as to whether the minimum standards for acceptance of a plea of guilty and waiver of counsel had been met (Burleigh County T., p. 18). Petitioner thereafter applied to the Supreme Court of North Dakota for such a writ.

We recognize that writs are sparingly granted, but the failure of the North Dakota Supreme Court to apply proper constitutional standards in a case where there was not an effective waiver of counsel nor an intelligent and well-informed guilty plea is of sufficient importance not only to the petitioner, but to all persons in the United States that we submit the writ should be allowed, and all courts advised of the proper standards.

Wherefore, it is respectfully submitted that the petitioner's prayer for a writ of certiorari to review the judgment of the Supreme Court of North Dakota should be granted.

Respectfully submitted,

Dated November 17, 1969.

JOHN P. DOSLAND
Box 539
Moorhead, Minnesota 56560
Attorney for Petitioner

APPENDIX

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

IN THE MATTER OF THE APPLICATION OF ERNEST EDWIN STONE FOR A WRIT OF HABEAS CORPUS

ERNEST EDWIN STONE,

Petitioner,

v.

STATE OF NORTH DAKOTA, and J. D. WOODLEY, Warden of the State Penitentiary, Bismarck, North Dakota,

Respondents.

Cr. 382

1. Where a petitioner alleges in his application for a writ of habeas corpus that he has been restrained of his liberty in violation of his constitutional rights, this court will review the allegations to determine whether the same are true and thus entitle him to his release.

2. A waiver of counsel by a defendant in a criminal action is effective when it is freely and voluntarily made.

3. Where the defendant was 39 years of age, had an eighth-grade education, had been married, was a cook by profession, was afforded opportunity at the preliminary hearing and at the arraignment to secure counsel, had

ample time to secure counsel, which was waived, and the pleas of guilty were not precipitated by inducement, threats, or coercion, such pleas were freely and voluntarily made.

4. Where the court in 1964, and before the decision in Miranda v. Arizona [1966], and before the arraignment, advised the accused that the crime with which he is charged is punishable by imprisonment in the State Penitentiary, that he is entitled to a jury trial, that he is entitled at all stages of the proceedings to the advice of a lawyer whom the court would provide if the defendant were without funds, and the defendant informed the court that he did not desire a lawyer and waived a jury trial, he intelligently and understandingly waived his rights under the United States Constitution, under § 13 of the North Dakota Constitution, and under § 29-13-03 of the North Dakota Century Code.

5. For reasons stated in the opinion, it is held that the petitioner's pleas of guilty and waiver of right to counsel in this case were freely and understandingly and intelligently made.

(Syllabus by the Court)

Original proceeding.

Writ of Habeas Corpus Quashed.

Opinion of the Court by Paulson, Judge.

Huseby & Backes, Fargo, and Dosland, Dosland & Nordhougen, Moorhead, Minnesota, for the petitioner.

Helgi Johanneson, Attorney General, and John E. Adams, Assistant Attorney General, Bismarck, for the respondents.

Stone v. Woodley

Paulson, Judge.

Ernest Edwin Stone, on September 8, 1964, pleaded guilty to the charges of the crimes of rape in the first degree and of assault with deadly weapon with intent to kill. Thereafter he was sentenced to the State Penitentiary by the Honorable Eugene A. Burdick, Judge of the District Court of McKenzie County, North Dakota. Stone has been incarcerated since that time.

On February 18, 1969, Stone secured a writ of habeas corpus from the District Court of Burleigh County and, on February 24, 1969, that court held a hearing, after which it issued its order quashing the writ. There is no provision under our law for appeal from this decision. Accordingly, pursuant to § 87 of the North Dakota Constitution, the petitioner has now filed an application for a writ of habeas corpus with this court, praying for his release. We issued the writ and the hearing on the return was held on June 25, 1969, before this court.

Formerly, the primary and only question involved in habeas corpus proceedings was one of jurisdiction—namely, whether the particular order, judgment, or process the validity of which was attacked came within the lawful authority of the court or officer making or issuing it. 39 Am. Jur. 2d, Habeas Corpus § 28; 39 C.J.S. Habeas Corpus § 16. Section 32-22-17 of the North Dakota Century Code sets forth the statutory grounds for the discharge of persons restrained and who are entitled to relief under the North Dakota Habeas Corpus Act.

The writ of habeas corpus cannot ordinarily be used to correct mere errors or irregularities in the proceedings of a trial court which are not jurisdictional and which, at the

most, render a judgment voidable. However, a judgment may be void and thereby subject to attack on habeas corpus for certain extreme irregularities other than lack of jurisdiction of the offense and of the person, as where fundamental constitutional rights have been violated during the course of the proceedings leading to conviction. 39 Am. Jur. 2d, Habeas Corpus § 30; 39 C.J.S. Habeas Corpus § 15. This court, in Fournier v. Roed, 161 N.W. 2d 458 (N.D. 1968), discusses the expansion of the writ of habeas corpus, in paragraph 1 of the syllabus:

> "In light of the law of the writ of habeas corpus as it has developed, when a petitioner alleges in his application for a writ of habeas corpus that he has been restrained of his liberty in violation of the Constitution or the laws or the treaties of the United States, this court will review that allegation on a writ of habeas corpus in order to determine whether the petitioner is being restrained in violation of fundamental law, entitling him to his release."

In the present case, Stone alleges that he is being restrained in violation of his constitutional rights and, therefore, a review of Stone's contentions is proper in this habeas corpus proceeding.

Stone asserts that the conviction, judgment, sentence, and commitment are defective and void, within the purview of § 32-22-17(3), N.D.C.C., for the following reasons:

1. Defendant was allowed to plead guilty when not represented by counsel, in violation of his constitutional rights.

2. He was allowed to plead guilty after a waiver

of counsel, which waiver was ill-formed and not intelligently made, and such fact became known to the trial court during the proceedings and, notwithstanding such knowledge, the trial court accepted the plea of guilty.

3. That at the time of such plea and hearing the defendant made statements to the court, which statements are of record and which statements are inconsistent with a plea of guilty, a fact known to the trial court, and, in spite of such knowledge, the trial court allowed the plea to stand.

4. Evidence was admitted by the trial court while defendant was not represented by counsel, which evidence is specifically prohibited by North Dakota statute, and, further, which evidence was not consistent with the plea of guilty made by this defendant, and, in spite of this knowledge, the trial court allowed and accepted the plea of guilty.

This brings us to the petitioner's major argument in this habeas corpus proceeding. Stone urges, basically, that his waiver of his right to have assistance of counsel, at the time he pleaded guilty to both crimes as charged, was not made in an intelligent and understanding manner, and, because of this ineffective waiver, he was allowed to plead guilty without counsel, which was a violation of his constitutional rights.

Prior to discussing this issue, we are required to determine first whether the plea of guilty entered by the petitioner was made freely and voluntarily. If the plea were not entered of the petitioner's own free will, it would not be necessary to consider the question of whether or not the petitioner made an effective waiver of his right to counsel.

A plea of guilty made by an accused must be free and voluntary. The court, in State v. Layer, 48 N.D. 366, 184 N.W. 666, 671 (1921), discusses this question thoroughly:

> "It is true, * * * that under the Constitution, one charged with crime is entitled to a trial by the jury, that he is presumed innocent until proven guilty, and that the state must prove him guilty beyond a reasonable doubt. It is likewise true that the defendant is the only person who can waive such rights. It is the law, however, in this state that the defendant has the right to waive, and the state to receive such waiver on the defendant's plea of guilty, and that upon such plea he may lawfully be convicted and imprisoned. It is likewise true that such waiver of such privilege must be a voluntary one, and free from all duress, fear, intimidation, and coercion; that is, he must not be induced or compelled to make his plea of guilty by reason of threats, or in any way forced to do so. In other words, his plea must be free and voluntary."

This rule of law was reemphasized in State v. Malnourie, 67 N.W. 2d 330, 331 (N.D. 1954), in the syllabus:

> "A plea of guilty induced by coercion will not support a judgment of conviction. Such a conviction violates the due process clause of the Constitution of the United States and should be vacated upon a proper motion."

In the Layer case, the court determined that the defendant failed to prove that there was any inducement or coercion which precipitated his plea of guilty. In the Malnourie case,

the court reversed the conviction because the plea was not voluntary. In the case at bar, it is necessary to carefully consider the record which resulted in Stone's pleas of guilty in order to determine whether or not such pleas were voluntary.

Mr. Stone, on July 21, 1964, was invited to the Fisher home by Mrs. Fisher, a co-employee of his who also worked at Jamie's Cafe in Williston, North Dakota. Prior to going to the Fisher home, Stone had consumed several drinks of alcoholic beverages. Upon his arrival at the Fisher home, at about 11:30 p.m., Mrs. Fisher introduced Stone to her husband. The three of them sat in the Fisher living room drinking beer until the early hours of the morning of the 22nd. After they had consumed about a case of beer, Fisher became angry with his wife for exhibiting an interest in Stone. Mrs. Fisher, upon this development, then left the Fisher home in one of the family automobiles. Shortly thereafter, Stone called a taxicab in order to search for Mrs. Fisher. Failing to find her, he returned to the Fisher home, at which time he and Mr. Fisher decided to search together for Mrs. Fisher. It was then approximately 6 a.m. on the 22nd of July and Mr. Fisher, not wanting to leave his three children home alone, awakened them and dressed them. All of them then entered Fisher's car and rode around the city of Williston, looking for Mrs. Fisher. Being unable to find her in Williston, they decided to drive to Sidney, Montana, where Fisher's mother lived, believing that Fisher's wife might be there. After arriving in Sidney and not finding her there, they decided to return to Williston. On the return trip, Fisher made a remark which caused Stone to become angry. Stone immediately drew his pocketknife and stabbed Fisher. Fisher drove off the road

into a ditch and stopped his car. Stone stabbed Fisher again and then pulled Fisher from the car and left him lying on the ground. Stone then reentered the vehicle in which the three Fisher children were still sitting and he attempted to drive the car out of the ditch. He was unsuccessful in his attempts and the car became hung up on a rock. Stone then became sexually aroused and engaged in intercourse with the oldest Fisher girl. Failing to do so to his complete satisfaction, he inserted his finger into her privates, which caused them to bleed. Stone then left the car and the children and walked to a farm, where he cleaned himself up and where he later was apprehended by the police.

The following day, on July 23, Stone accompanied Sheriff Gerald F. Shafer and Special Agent Richard S. Hilde, of the State Bureau of Criminal Identification, to the scene of the crimes. Stone then signed a written statement wherein he related the above events. That statement contained the following waiver of Stone's right to assistance of counsel:

> "I have been informed that I have the right to the services of an attorney, but such is not my desire at this time. I know that any statement I make may be used for or against me in a court of law."

On the same day that the statement was signed by Stone, separate complaints were issued whereby Stone was charged with the crimes of rape in the first degree and of assault with deadly weapon with intent to kill, based on the events that happened on the 22nd day of July. On July 24, Stone appeared before the county justice at Watford City, North Dakota, who informed Stone of his right to the aid of

counsel at every stage of the proceedings; of his right to have witnesses called in his behalf; of his right to preliminary hearings; of his right to waive preliminary hearings; and of his right to time in which to prepare for trial or for preliminary examinations. The notations of the county justice set forth in the return to the district court reveal that the defendant, Ernest Edwin Stone, understood the complaints perfectly and that he was guilty, and that he desired to waive preliminary hearings in order that he could be arraigned before the district court at an early date for the purpose of entering his pleas. The county justice ordered Stone bound over to the district court. On September 4, 1964, informations against Stone were filed with the clerk of the district court of McKenzie County, and on September 8, 1964, Stone was arraigned. He entered separate pleas of guilty to the crimes of rape in the first degree and of assault with deadly weapon with intent to kill.

In State v. Layer, supra, the defendant had signed a confession prior to the time he had pleaded guilty and it was Layer's intention also that he be taken before the district court as soon as possible so that he could enter his plea of guilty to the crime of murder. The court refused to permit the defendant to withdraw his plea of guilty and to allow him to enter a plea of not guilty, because the affidavits submitted in support of the defendant's motion were attempting to show that the defendant was coerced into entering a plea of guilty, which affidavits had no probative value. The affidavits were in support of an attempt to show the coercive means employed against the defendant, but the court did not give any credence to them. The judgment was affirmed on appeal.

This court, in the Layer case, considered the question

of whether the plea was voluntary. The petitioner in the instant case, Ernest Edwin Stone, does not submit any proof to support his claim that he was ever induced or coerced into pleading guilty. Furthermore, the record is devoid of any evidence which would in any manner assist this court in determining whether the guilty pleas were involuntary. On the contrary, the record reveals that Stone voluntarily made a statement admitting the commission of the two crimes with which he was charged. Further, the county justice's notations indicate that Stone intended to plead guilty at an early date and thus the pleas of guilty to the crimes as charged were voluntary.

State v. Malnourie, supra, is the second North Dakota case which considered the question of whether the plea was voluntarily entered. In the Malnourie case the accused had confessed to the crime of murder, and after he had pleaded guilty to the charge, the judge examined him to determine the punishment which should be imposed; and at that time the defendant denied any participation in the crime or any knowledge of it at all. The testimony adduced by the judge's examination of the defendant showed that, prior to the confession made by Malnourie, he had been continuously beaten and abused, and that he had been questioned for a long period of time, during which a mob of people were threatening to harm him.

The Supreme Court was of the opinion that the answers given in response to the judge's questioning revealed that there was not a voluntary waiver, nor was the plea of guilty entered in a free and voluntary manner. The case at bar is clearly distinguishable, because the petitioner is not claiming that any coercion, intimidation, or threats induced him to enter pleas of guilty. A defendant can plead

guilty voluntarily to an information and the court may accept it. State v. O'Neill, 117 N.W. 2d 857 (N.D. 1962); State v. Throndson, 49 N.D. 348, 191 N.W. 628 (1923). The petitioner has done so in this case and, after a full examination of the record, we determine that his pleas of guilty were freely and voluntarily entered.

Having decided that Stone's pleas of guilty were freely and voluntarily entered, we are now faced with the petitioner's second contention; that is: Did the defendant effectively and intelligently and understandingly waive his right to the assistance of counsel at the time he pleaded guilty to the crime of rape in the first degree and the crime of assault with deadly weapon with intent to kill? It is thus necessary to reexamine the entire record to determine whether the defendant freely and understandingly waived counsel.

Whether an accused person has effectively waived his right to counsel depends largely on the facts and circumstances of the particular case. State v. Whiteman, 67 N.W. 2d 599 (N.D. 1954). Among probative factors bearing on this question are the age, education, and mental capacity of the defendant, his background and experience, and his conduct at the time of the alleged waiver. 21 Am. Jur. 2d, Criminal Law § 317.

The record reveals that Stone was 39 years of age at the time of the commission of the two offenses, and that, after receiving an eighth-grade education, he entered the service. After being separated from the service, Stone was married and later divorced. While he was married, he was charged with child desertion and he is now paying about $173 a month for the support of his two children. He had been arrested three times prior to this present conviction,

on charges of burglary, rape, and public intoxication, none of which arrests resulted in conviction except on the charge of public intoxication.

An examination of the record discloses what was stated by the petitioner concerning the waiver of his right to counsel. The pertinent questions and answers with reference to the rape charge are as follows:

> "The Court: Do you understand the nature of these proceedings?
>
> "Mr. Stone: Yes, your Honor.
>
> "The Court: And are you represented by counsel?
>
> "Mr. Stone: No, sir.
>
> "The Court: This is a criminal action brought to
>
> "The Court: *This is a criminal action brought to this Court, that is to say the District Court, of McKenzie County, North Dakota, charging you with the crime of Rape in the First Degree. This is a criminal offense punishable by imprisonment in the State Penitentiary for not less than one year and accordingly you are entitled to trial by jury on this charge, and you are also entitled to have the services of a lawyer to advise you at all stages of the proceedings and in particular before pleading to the Criminal Information, and if you are without funds sufficient to employ counsel, the Court will appoint an attorney for you. In the light of this information, do you wish to have the services of a lawyer before further proceedings are had?* [Emphasis added.]
>
> "Mr. Stone: No, sir, your Honor.
>
> "The Court: Now, have you given this matter some consideration?
>
> "Mr .Stone: Yes, your Honor.

"The Court: And in making this decision have you been promised any reward or other inducement of any kind?

"Mr. Stone: No, sir.

"The Court: And you understand that you have the right to jury trial if you wish?

"Mr. Stone: I understand, sir.

"The Court: The Court's Minutes will show that the defendant, Ernest Edwin Stone, has been advised of his right to counsel and that he has expressly waived such right.

Mr. Stone, you have 24 hours in which to consider your plea to the Criminal Information if you wish. However, if you are ready to plead to the Criminal Information at this time you may so indicate.

"Mr. Stone: I am, your Honor.

"The Court: Are you ready to plead at this time?

"Mr. Stone: Yes, sir, I am.

* * * [The Criminal Information was read.]

"The Court: Ernest Edwin Stone, have you heard the reading of the Criminal Information?

"Mr. Stone: Yes, sir, your Honor.

"The Court: And you do understand that you are charged with the crime of Rape in the First Degree?

"Mr. Stone: Yes, your Honor.

"The Court: How do you plead to the Criminal Information, guilty or not guilty?

"Mr. Stone: Guilty, sir.

"The Court: Now, before accepting your plea, I'd like to ask you again if anyone, any officer has promised you any reward or subjected you to any threat or coercion to induce you to plead guilty to the charge.

"Mr. Stone: No, sir, your Honor.

"The Court: In that case the plea of guilty is received and the Court's Minutes will show that the defendant, Ernest Edwin Stone, pleads that he is guilty of the crime of Rape in the First Degree as charged in the Criminal Information. You may be seated."

A further perusal of the record reveals the pertinent questions and answers, with reference to the charge of assault with deadly weapon with intent to kill:

"By the Court:

"Q. Mr. Stone, what is your true and full name?

"A. (By Mr. Stone) Ernest Edwin Stone.

"Q. Is your name correctly shown in the Criminal Information?

"A. Yes, sir, your Honor.

"Q. What is the date of your birth?

"A. November the 26th, 1924.

"Q. Where were you born?

"A. Great Bend, Kansas.

"Q. What formal education have you had?

"A. 8th grade, sir.

"Q. Where did you complete the 8th grade?

"A. Great Bend, Kansas.

"Q. Do you understand the nature of these proceedings?

"A. Yes, sir, your Honor.

"Q. Are you represented by a lawyer?

"A. No, sir.

"Q. *(By the Court) This is a criminal action brought to this Court by the filing of a Criminal Information charging you with the crime of Assault*

with a Deadly Weapon with Intent to Kill. This crime is punishable by imprisonment in the Penitentiary for not less than one year nor more than ten years. Accordingly you are entitled to trial by jury on this charge, and you are also entitled to the advice of a lawyer at all stages of the procedings and especially to advise you before pleading to the Criminal Information, and to assist you in preparing your defense or in preparing your evidence if you so desire, and if you are without funds sufficient to employ an attorney, the Court will appoint one for you. In the light of this Information do you wish to have the services of a lawyer before further proceedings are had? [Emphasis added.]

"A. (By Mr. Stone) No, sir, your Honor.

"The Court: Do you understand that you have the right to have the services of a lawyer if you wish?

"Mr. Stone: Yes, sir.

"The Court: And has anyone made any promises or coerced you in any way to cause you to waive your right to a lawyer?

"Mr. Stone: No, sir.

"The Court: The Court's Minutes will show that the defendant Ernest Edwin Stone has been advised of his right to counsel and that he has expressly waived such right.

Now, you have 24 hours in which to consider your plea to the Criminal Information. However, if you are ready to plead to the Criminal Information at this time you may so indicate.

"Mr. Stone: I am, your Honor.

"The Court: In that case the motion to arraign is

granted, the Defendant will rise and face the Court and the State's Attorney will read the Criminal Information."

[The Criminal Information was read.]

* * * * *

"The Court: Ernest Edwin Stone, have you heard the reading of the Criminal Information?

"*Mr. Stone*: Yes, sir, your Honor.

"The Court: And do you understand that you are charged with the crime of Assault with Deadly Weapon with Intent to Kill?

"Mr. Stone: Yes, sir.

"The Court: How do you plead to the Criminal Information, guilty or not guilty?

"Mr. Stone: Guilty, sir.

"The Court: Before receiving the plea of guilty, I'll ask you if anyone has promised you any reward or has coerced you in any way to make this plea to the Criminal Information?

"Mr. Stone: No, sir.

"The Court: In that case the Court will receive the plea of guilty to the Criminal Information and the Court's Minutes will show that Ernest Edwin Stone pleads that he is guilty of the crime of Assault with a Deadly Weapon as charged in the Criminal Information. You may be seated."

Section 13 of the North Dakota Constitution guarantees to one accused of crime the right to appear and defend in person with counsel, Sections 29-01-06, 29-01-27, and 29-13-03, N.D.C.C., are legislative expressions of the guarantee to one accused of crime of the right to appear in

person and with counsel. These legislative declarations set a minimum standard which should be followed in order to afford the defendant his right to counsel as guaranteed. State v. Whiteman, supra; State v. O'Neill, 117 N.W. 2d 857 (N.D. 1962).

Section 29-13-03, N.D.C.C., provides:

> "If a defendant appears for arraignment without counsel, he must be informed by the court that it is his right to have counsel before being arraigned and must be asked if he desires the aid of counsel. If he desires, and is unable to employ, counsel, the court must assign counsel to defend him * * *."

The Sixth Amendment of the United States Constitution entitles one charged with a crime to the assistance of counsel. In Johnson v. Zerbst, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938), the court said:

> "* * * compliance with this constitutional mandate is an essential jurisdictional prerequisite to a federal court's authority to deprive an accused of his life or liberty. When this right is properly waived, the assistance of counsel is no longer a necessary element of the court's jurisdiction to proceed to conviction and sentence." 304 U.S. at 367.

The court also stated:

> "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." 304 U.S. at 464.

Since that decision, the United States Supreme Court has held the Sixth Amendment to the Federal Constitution di-

rectly applicable to the States in criminal prosecutions through the Fourteenth Amendment. Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963). Therefore, this court must adduce and determine from the facts surrounding Stone's pleas of guilty whether he made an intentional relinquishment or abandonment of his right to the assistance of counsel.

There are three major cases in North Dakota which we can use as guides to determine whether Stone's waiver was intentional. In State v. Magrum, 76 N.D. 527, 38 N.W. 2d 358 (N.D. 1949), the court held that the defendant did not freely and understandingly waive his right to assistance of counsel. When Magrum was sentenced he was a minor 19 years of age. Magrum was taken into custody and held incommunicado by the sheriff as a material witness in connection with the murder of one Carl Wilson. On several occasions the accused's brother was denied permission to see him. At eight o'clock in the evening on which he was taken into custody, he was brought before the magistrate upon a complaint charging him with murder in the first degree, and was bound over to the district court. An information was immediately filed, and he was arraigned at nine o'clock the same evening in the district court. Magrum pleaded guilty after being asked if he would like to hire an attorney, to which question he replied in the negative. He was committed to the State penitentiary.

In State v. Whiteman, supra, the court determined that the defendant did not freely and understandingly waive counsel. The defendant was an Indian citizen, 25 years of age, possessing only a grade-school education. Whiteman was not permitted to consult with nor receive advice from any person. He had been detained in an atmosphere of

hostility, of which the trial court was not aware. He had been subjected to intimidation, threats, and even violence, and the evidence bears out the fact that he decided that there was nothing he could do except plead guilty to the information charging him with murder in the first degree. He was of the opinion that he had no alternative but to waive counsel. His waiver was one compelled by lack of choice, arising from the necessities of the existing circumstances.

In State v. O'Neill, supra, the court held that the defendant failed to prove that he did not waive his right to assistance of counsel in a free and understanding manner. The defendant was 21 years of age and had previously appeared before the courts on numerous occasions. The defendant signed a written confession, reciting details of the crime, and answered further questions propounded by the court during the arraignment. There was no evidence of inducement or coercion. He pleaded guilty after repeatedly telling the court that he did not desire an attorney. His responses were prompt and intelligent and indicated an ununderstanding of the questions asked by the court.

Having reviewed the entire record and considered the command of the State and Federal Constitutions and of the North Dakota Statutes in force and effect, this court is of the opinion that the questions asked by the trial court and the answers given in response thereto were amply sufficient to effectively advise Stone of his right to the assistance of counsel, and that the waiver by Stone of his right to the assistance of counsel was effectively and intelligently and understandingly made. Stone signed a written confession, reciting the details of the crimes charged. Stone furnished further details in response to questions by the court during the

arraignment proceedings. No evidence of threats, inducement, or coercion is contained in the record. He pleaded guilty to the two charges after stating several times that he did not want an attorney. His responses revealed that he understood the questions propounded to him in the examination by the court. His answers were intelligent. Further, nearly five years have elapsed between the time of sentence and the application for relief by habeas corpus.

Petitioner urges that he was apprised that he could be imprisoned for not less than one year and that he was unaware of the maximum sentence, that is, of life imprisonment, upon entering a plea of guilty, as set forth in § 12-06-25, N.D.C.C. It is contended that petitioner was misled and was unable to understand from the statement of the court that petitioner would be sentenced to more than a year in the State Penitentiary. The sentencing statute, § 12-30-05, N.D.C.C., reads as follows:

> "Rape in the first degree shall be punished by imprisonment in the penitentiary for not less than one year."

In People v. Jackson, 27 A.D. 2d 943, 279 N.Y.S. 2d 259, 260 (1967), the court held that:

> "The phrase 'not less than' one and one-half years is not to be read, as defendant contends, as if it were 'not more than' one and one-half years."

We adopt the holding of the above court and, accordingly, the petitioner's contention is without merit.

Stone's third assertion is governed by § 29-14-16, N.D. C.C., which vests in the trial court the discretionary power to refuse to accept the guilty plea of the accused. A re-

view of the entire record in this case fails to indicate that the trial judge abused his discretion by not refusing to accept the accused's pleas of guilty because of alleged inconsistencies. The record clearly reveals that there are no inconsistencies.

Stone's fourth argument is based upon § 29-26-18, N.D.C.C., which provides that all evidence in aggravation or mitigation of punishment must be presented by testimony of witnesses examined in open court. In the case at bar, statements signed by two doctors were introduced to show the extent of the physical injuries incurred by both victims. The pertinent language contained in the transcript of the hearing before Judge Burdick is as follows:

> "Mr. Anthony: * * * and also offer what has been marked State's Exhibit 11, which is a subscribed and sworn statement by Dr. Craven, Medical Doctor of Williston, North Dakota; and State's Exhibit No. 12, which is a signed statement by Mr. Dr. C. Oliver, a Medical Doctor of Watford City, North Dakota.
>
> "The Court: * * * I'd like the defendant to know that Exhibits 11 and 12 cannot be received in evidence over the defendant's objection; namely, the medical exhibits, because the opportunity for cross-examination would not be afforded. However, if the defendant has no objection, the Exhibits will be received in evidence.
>
> "Mr. Stone: I have no objection.
>
> "The Court: Exhibits 11 and 12 are received in evidence."

Section 29-26-18, N.D.C.C., has been interpreted in State v. Hefta, 88 N.W. 2d 626, 629 (N.D. 1958), in which this court stated:

"Defendant was present when the exhibits were offered and made no objection. He must be held to have waived the right to make any such objection."

The present case is similar to the Hefta case. However, here the trial court went further and explained to the defendant that Stone could object to the admissibility of Exhibits 11 and 12, but Stone still stated that he did not desire to object. On the basis of the record in this case, the third and fourth contentions of the petitioner are without merit.

For reasons stated in the opinion, the writ of habeas corpus is hereby quashed.

WM. L. PAULSON
RALPH J. ERICKSTAD
ALVIN C. STRUTZ
HARVEY B. KNUDSON
OBERT C. TEIGEN, C. J.

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In the
Supreme Court of the United States

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NO. 910

ERNEST EDWIN STONE

Petitioner

vs.

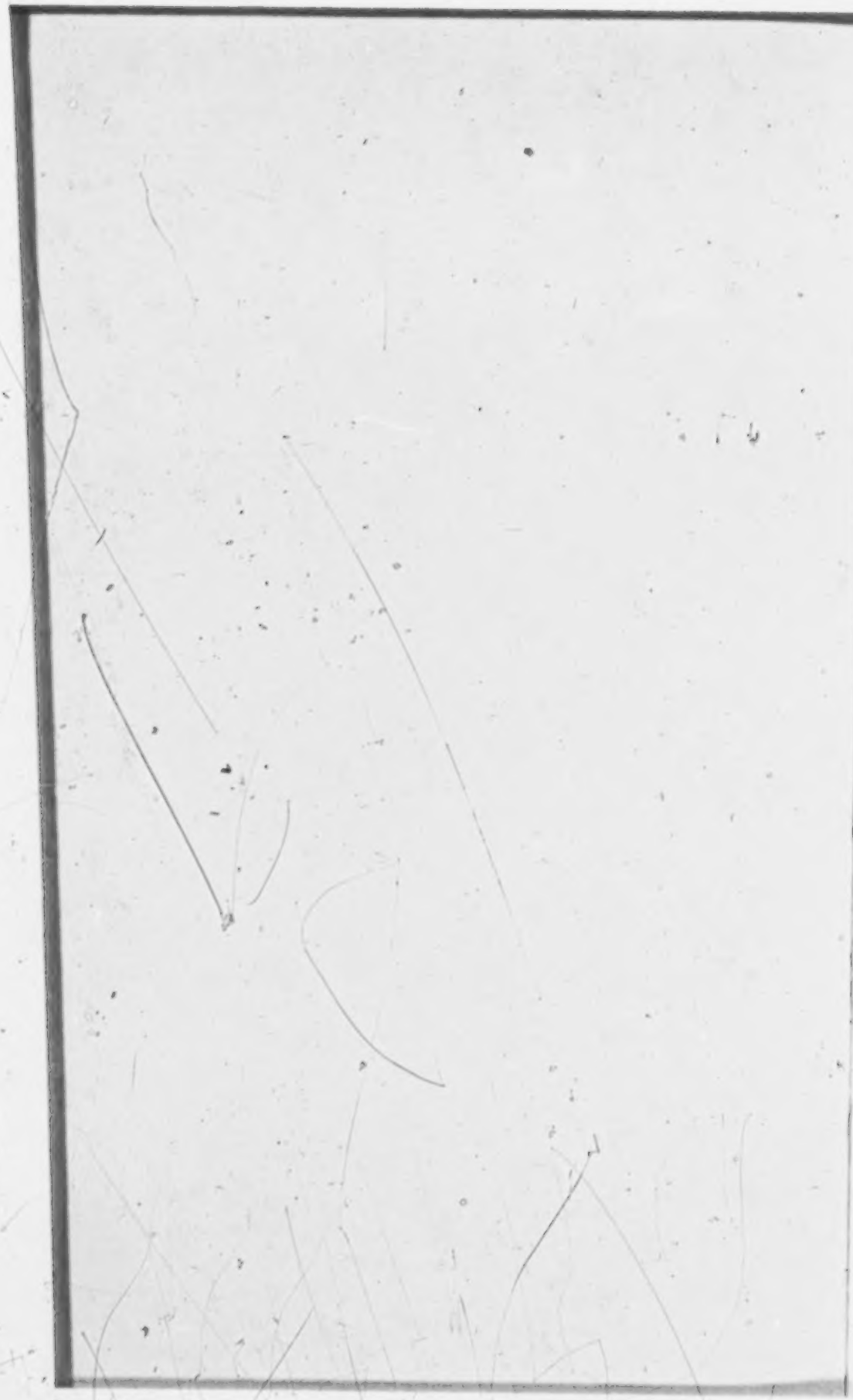
STATE OF NORTH DAKOTA AND J.D. WOODLEY,
WARDEN OF THE STATE PENITENTIARY
AT BISMARCK, NORTH DAKOTA

Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH DAKOTA

HELGI JOHANNESON
ATTORNEY GENERAL
STATE OF NORTH DAKOTA

JOHN E. ADAMS
ASSISTANT ATTORNEY GENERAL
STATE OF NORTH DAKOTA
STATE CAPITAOL BUILDING
BISMARCK, NORTH DAKOTA
58501
Attorney for Respondents



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In the
Supreme Court of the United States

ERNEST EDWIN STONE

VS

Petitioner

STATE OF NORTH DAKOTA AND J.D. WOODLEY, WARDEN OF THE STATE PENITENTIARY AT BISMARCK, NORTH DAKOTA

Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH DAKOTA

To the Honorable, Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Respondents, State of North Dakota and J.D. Woodley, Warden of the State Penitentiary, at Bismarck, North Dakota, oppose the Petitioner's prayer for issuance of a Writ of Certiorari to review the Order of the Supreme Court of North Dakota quashing writ of habeas corpus rendered and entered against the Petitioner on the 25th day of September 1969. The opinion upon which this order is based is dated September 24, 1969. The opinion has not been officially reported in a State Reporter, but has been reported in 171 N.W. 2d 119. Pursuant to this opinion, a minute order was entered in the docket book quashing the writ. Copies of the opinion are attached to the petition herein.

JURISDICTION OF THIS COURT

The Petitioner states in his petition that he relies upon the provisions of Amendments V, VI, and XIV to the United States Constitution which preserves for him the privilege against compulsory self-incrimination, the right to trial by jury, the right to be informed of the nature and cause of the accusation and to be confronted with the witnesses against him, and to have the assistance of counsel for his defense; and upon 28 U.S.C.A., Section 1257, Subdivision 3, to have writ of certiorari granted and to sustain the jurisdiction of this Court. The Respondents contend that there is no indication that the Petitioner was in any way deprived of these privileges and rights, that Petitioner refuses to testify that he was in any way deprived of these

privileges and rights, and that the records herein affirmatively show by the Petitioner's own testimony that these rights were and are at all times available to the Petitioner, except as limited by the Petitioner's waivers and refusals to accept such rights.

QUESTION PRESENTED FOR REVIEW

These Respondents contend that the basic question presented for review at this point is:

Whether the Supreme Court of the United States should review by writ of certiorari the order quashing writ of Habeas Corpus entered by the Supreme Court of the State of North Dakota?

These respondents further contend that if these proceedings get to the point where the questions the Petitioner claims to wish to present are before the Supreme Court of the United States that they are easily answered by the face of the record available in the proceedings before the North Dakota District Courts and the Supreme Court as follows:

Acceptance of Plea of Guilty

The Petitioner did intelligently and understandingly enter his plea of guilty without the assistance of counsel and the record shows that at the same proceedings all statements made were under oath and were and are fully consistent with and supportive of such plea of guilty.

Waiver of Right to Counsel

The Petitioner by rejecting the trial court's offer of the assistance of counsel and by pleading guilty did make an intelligent and understanding waiver of the right to counsel, the record shows that the Court made an extensive, comprehensive examination of the Petitioner's waiver, and all of the statements made by the accused in the proceedings were under oath and were and are fully consistent with and fully supportive of his plea of guilty.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Petitioner presents accurately portions of Amendments V, VI and XIV of the United States Constitution. In so far as they are adequately quoted to the extent included in Petitioner's petition, we will not repeat them at this point, although we will comment that they were adequately considered in all State

District Court proceedings, and in the State Supreme Court proceedings. We further contend that if they were presented to the Federal District Court in a Habeas Corpus proceeding in regard to this case, the Federal District Court must necessarily arrive at the same final result as was reached by the State District Court and State Supreme Court.

We contend, however, that at this point in the proceedings a more important criterion is the statutory provision under which this proceeding purports to be brought. As we understand Petitioner's contention this proceeding is based upon Title 28, U.S.C.A. Section 1257, Subdivision 3, and as we understand the full context of the petition those portions thereof, providing as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
> *
> (3) By writ of certiorari, where * * * * * * * * * any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

Further, as we understand Petitioner's contentions, it is not brought pursuant to Title 28, U.S.C.A., Section 2241, which provides insofar as here applicable:

> "(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.
> (b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.
> (c) The writ of habeas corpus shall not extend to a prisoner unless * * * * * * * * * * * * * * * * * * *

At this point we believe it is of importance to examine into the reason why the remedy under the Federal certiorari statutes rather than under the Federal habeas corpus statute was chosen by this Petitioner. While we are going to go into the details of why such is the case in a later section of this brief, at this point we will state our conclusion as to this point as follows, to-wit: Each and every point upon which Petitioner claims there has been a violation of, or deprivation of constitutionally protected rights, would require any Court to decide that a factual situation exists directly contrary to the sworn testimony of Petitioner. It is conceivable that facts do exist that might modify the obvious conclusions to be reached from the sworn testimony of the Petitioner, but Petitioner in all proceedings to date has chosen to rely on the Courts, assuming such facts to exist (contrary to the evidence) rather than presenting any evidence of such conceivable facts. This, the State Courts have refused to do, and we presume the Federal Courts will be equally reluctant to assume such facts to exist (contrary to the evidence) whether on habeas corpus or certiorari proceedings.

At this point we believe we should present the distinction between the Federal and State statutes with regard to the remedies available to the Petitioner.

Petitioner's obvious claim is that he is imprisoned pursuant to a plea of guilty made in the State Court. Federal Rule No. 32 (d) appears to be quite strict in regard to withdrawal of such a plea. In so far as here applicable, it states:

> "(d) WITHDRAWAL OF PLEA OF GUILTY. A motion to withdraw a plea of guilty or of nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea."

The North Dakota rule would appear to be quite liberal as compared with this rule. As statutorily specified in Section 29-14-22 of the North Dakota Century Code, it provides:

> "PLEA OF GUILTY MAY BE WITHDRAWN.—The court, at any time before judgment, upon a plea of guilty, may permit it to be withdrawn. If judgment has been entered thereon, the court may set it aside, and, in lieu thereof, may allow a plea of not guilty, or, with the consent of the state's attorney, may allow a plea of a lesser included offense, or of a lesser degree of the offense charged."

As to the actual operation of this rule, see State vs Magrum 38 N.W. 2d 358, 76 N.D. 527. As to the procedure to utilize this rule, at the present time see Chapter 29-32 of the 1969 Supplement to the North Dakota Century Code.

At this point, we believe it proper to return to the Federal statute under which this proceeding purports to be brought. If Petitioner actually did not fully and intelligently understand his own actions under the State procedure, the simple solution would be for him to make a motion to withdraw his plea of guilty, furnish by affidavit or oral testimony the facts upon which such lack of intelligence or understanding are based, and present same to the State District Court, which accepted his waivers and plea. If the Court refused to grant the motion, same could be appealed to the Supreme Court of this State, at which point the highest Court of this State could render its final judgment or decree upon the actual facts of the case rather than upon speculations as to what facts, contrary to Petitioner's previous testimony, exist as advanced by counsel for Petitioner in habeas corpus proceedings. There is no showing in the current proceeding that the Petitioner has even attempted to secure a final judgment or decree rendered by the highest Court of this State in which a decision could be had as to the factual speculations his counsel now make and, therefore, he is not entitled to certiorari in the Supreme Court of the United States under Title 28 U.S.C.A. Section 1257 or any other law, or rule.

SUPREME COURT RULE PROVISION

Rule 19, of the United States Supreme Court Rules 28 U.S.C.A., page 30, provides insofar as here applicable:

"RULE 19. CONSIDERATIONS GOVERNING REVIEW ON CERTIORARI

1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
   (a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

* * * \

We submit that the records herein show that if a Federal question has been prsented to the Courts of this State in this instance, it has been decided by the Courts of this State in full accordance with the applicable decisions of the United States Supreme Court.

A CONCISE STATEMENT OF THE CASE

On the 4th day of September, 1964, the District Court in and for McKenzie County, North Dakota, ordered that Criminal Informations against this Petitioner be filed. (McKenzie County Transcript, pages 1 and 7). On the 8th day of September, 1964, the matters came on for hearing before the Court. (McKenzie County Transcript, page 1). The State's Attorney of McKenzie County moved to arraign the Defendant. (McKenzie County Transcript pages 2 and 7).

The Court was informed by Petitioner that he was approximately thirty-nine years of age, that he had received an 8th grade education, that he understood the nature of the proceedings, that he was not represented by counsel, that he had given the matter some consideration, that he had been promised no reward or other inducement, that he understood that he had the right to a jury trial, that he had the right to the services of a lawyer, and that he was ready to plead to the Criminal Informations. (Pages 2 through 4 and pages 8 through 9, McKenzie County Transcript). The Court specifically informed the defendant of the nature of the charges, that they were punishable by imprisonment in the State Penitentiary, that he was entitled to trial by jury and to have the services of a lawyer, and that if he was without funds sufficient to employ counsel the Court would appoint an attorney for him. (Pages 3, 8 and 9 McKenzie County Transcript).

The Petitioner specifically indicated that he did not wish the services of an attorney, (Pages 4 and 9, McKenzie County Transcript). He further specifically indicated that he was ready to plead to the charges and did not wish twenty four hours to consider his plea. (Pages 4 and 9, McKenzie County Transcript).

Subsequent to this exchange of information, the Court granted the State's Attorney's motion to arraign the defendant, (Pages 4 and 9, McKenzie County Transcript).

The full text of the Criminal Information charging the crime of rape in the first degree, (Sections 12-30-01, 12-30-04,

and 12-30-05 of the North Dakota Century Code), and the crime of assault with deadly weapon with intent to kill, (Section 12-26-07 of the North Dakota Century Code), was read to the Defendant. (Pages 5 and 6, 10 and 11, McKenzie County Transcript).

Subsequent to the heretofore mentioned proceedings, the Defendant stated that he pleaded guilty to the charges. (Pages 6 and 11, McKenzie County Transcript). At this point the Court inquired further as to whether anyone any officer had promised any reward or subjected him to any threat or coercion to induce him to plead guilty to the charges. (Pages 6 and 11 McKenzie County Transcript). Upon being assured that such was not the case, the Court received the pleas of guilty. (Pages 6 and 11, McKenzie County Transcript).

At this point in the proceedings the States Attorney moved to consolidate the two cases and introduced a considerable amount of testimony and other evidence relating to the events leading up to the eventual conviction and sentencing of the Petitioner herein. Throughout the testimony the Court took an active part in determining the nature of the offenses charged and the intelligent understanding of the Defendant of the precise nature of the offenses charged.

Petitioner in his petition does attempt to take testimony out of parts of the transcript and attempts to show a lack of understanding of the nature of the charges, or that such statements are inconsistent with the pleas of guilty. At this point, rather than outlining the entire events shown in the transcript we will only attempt to place them in proper context to enable this Court to determine that Petitioner did fully understand the nature of the charges and that his statements are fully consistent with his pleas of guilty.

We would certainly not wish this case to be another instance such as Conway vs California Adult Authority decided by the Supreme Court of the United States under date of December 8, 1969, where neither the Petitioner nor the State gave the Court opportunity to consider the facts shown by the available record during the certiorari stage, resulting in an unjustifiable intrusion upon the time of the Court.

We might mention at this point that the Petitioner was apparently no stranger to criminal charges or the charge of rape. (Page 62, McKenzie County Transcript).

At page 4, paragraph 4, of his petition, Petitioner indicates that the initial stabbing by Petitioner was after an argument.

This statement is basically true. There were several arguments as shown in the McKenzie County Transcript prior to the stabbing, i.e. the night before there had apparently been some unfriendly discussion about the Petitioner kissing Mr. Fischer's wife, (Page 15, McKenzie County Transcript), and during the day there had apparently been some unfriendly discussion about the Petitioner taking Mr. Fischer's five year old daughter's panties off, (Page 23, McKenzie County Transcript), etc. However, if this statement is meant to cause this Court to infer that the stabbing was during the course of or immediately after an argument, some consideration should be given to the testimony of Mr. Fischer, (Page 28, McKenzie County Transcript), to the effect that immediately prior to the stabbing it seemed to him that they were getting along pretty well up to the point where he felt a pain, looked down, and noted that Petitioner was pulling his knife out of Mr. Fischer's body, at which point Mr. Fischer assumed that perhaps they were not getting along so well. Petitioner's testimony also does seem to leave some doubts as to whether there was an argument prior to the stabbing. While he does testify that he was told to "shut up for a little while" prior to the stabbing, (Page 50, McKenzie County Transcript), he does not positively indicate that this made him angry. He does concede that "I guess in a way you might say it made me angry", (Page 51, McKenzie County Transcript).

Petitioner also informs us that the only statements made by the Petitioner with regard to "intent to kill" are found on Page 51 of the McKenzie County Transcript, and basically this is also a true statement. The point of difficulty with this concept, however, is that we feel the "intent to kill" can be found throughout the entire record of the proceedings and throughout the events recounted in the McKenzie County Transcript. More specifically, we would call attention to the testimony of Mr. Fischer that he was driving the automobile at sixty, sixty-five miles per hour at the time the stabbing commenced, (Page 28 McKenzie County Transcript), that the stabbing continued as the car was driven off the road, through a ditch, through a fence, and, as Mr. Fischer was pulled out of the car by Petitioner, as he was lying on the ground and subsequently everytime Mr. Fischer moved, to the point where Mr. Fischer succeeded in convincing the Petitioner that he was dead, (Pages 29 and 30 of the McKenzie County Transcript). Petitioner, in substance, admits all of

these events, and after hearing Mr. Fischer's testimony, does not deem it appropriate to deny any phase of it, but rather affirmatively admits it, (Pages 50, 51, and 52, McKenzie County Transcript), at which point his statements that he thought he had killed him and that he took it for granted he was dead necessarily convey the meaning that he had successfully carried out the project undertaken, at least at the point he commenced stabbing Mr. Fischer.

The contentions in the Petitioner's Brief (Pages 5 and 6) as to Petitioner denying any knowledge of sexual penetration, denying penetration and being confused as to whether there was penetration, would possibly be supported by the quotations from the transcript if this were the type of rape case where young people of approximately equal physical abilities and amorous intent were disputing whether they had gone too far in the course of a "necking" party. However, that is not the type of case with which we are here concerned. The rape was immediately after the girl's father had been presumably killed. Virginia Fischer, the rape victim, was five years of age at the time of the rape. (See page 13, McKenzie County Transcript). Petitioner was thirty-nine years of age, (See pages 2 and 8, McKenzie County Transcript). In these circumstances, we submit that the portions of the Transcript quoted indicate no denial or confusion as to whether there was a penetration or not. Obviously in these circumstances there might well be some question to the depth of penetration, and this is precisely what was asked for and what was given in the way of testimony. On the face of the quoted portions of the testimony, as well as the remainder of the testimony on this subject contained in the McKenzie County Transcript, there was no question in Petitioner's mind, as to there being actual sexual penetration. He is not positive that he got his entire penis in though it is obvious that he knew that there was at least a partial insertion. There is, of course, also further testimony as to Petitioner's investigation of this question and his positive statement that would indicate that after his insertion the vagina of the girl was bleeding, (Page 55, McKenzie County Transcript).

HOW FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

We agree with Petitioner's statement that Petitioner made

application to the District Court of Burleigh County, North Dakota, on the 18th day of February 1969, for a Writ of Habeas Corpus and a Writ was issued returnable on the 24th day of February, 1969. The Petitioner also informs us in his petition that "After hearing, the Writ of Habeas Corpus was quashed on the 24th day of February, 1969, the District Judge stating that the Supreme Court of North Dakota had not as yet given the lower court guidelines or minimum standards to follow: (Burleigh County T., page 20)." This statement also contains elements of truth, however, we are certain that this Court will better understand the actual meaning of these elements of truth if we explain the context in which these elements of truth exist.

In the first instance we feel obliged to mention that the statement accredited to the District Judge was made subsequent to the discussions of the Court with counsel. The statement is no part of the final order of the District Judge disposing of the proceeding. We are not certain at this point that briefs of counsel in the State District Court proceeding have been made a part of the record in this proceeding. We hope they have. The brief and argument of Petitioner's counsel were mainly orientated towards a decision of the Michigan Court of Appeals in People vs Taylor, 155 N.W. 2d 723. Unlike most other decisions in this field, the Michigan Court of Appeals in this case sets out a "suggested form of interrogation", a series of form questions, or a "do-it-yourself kit" by which we presume it is intended any Court or probably any police officer subject to the Michigan statutes could solve all questions with regard to the taking of a plea of guilty regardless of the facts, statutes, circumstances, etc. These were what Petitioner's counsel apparently considered to be "guidelines" and the demand of counsel for Petitioner in the Burleigh County District Court proceedings was apparently that the Burleigh County District Judge should compare the questions asked by the McKenzie County, North Dakota District Court Judge, with these questions propounded by the Michigan Court of Appeals under the Michigan statutes, and if there were any discrepancies between the questions asked by the McKenzie County District Court judge and these "guidelines" the prisoner should be released. Actually we do feel that the substance of the material adduced by the questioning of the McKenzie County, North Dakota District Court Judge was more rather than less substantial than the material

that would have been adduced by utilization of the Michigan Court of Appeals' "guidelines". However, the Burleigh County District Court Judge in this statement in the course of discussions with counsel was attempting to point out in language that would be understood by counsel that the proceedings before him were going to be handled by due judicial process, not the application of a set of form questions to an unrelated set of facts under different statutes. We might also note that the Supreme Court of Michigan has also adopted a similar point of view. See People vs Taylor, 156 N.W. 2d 793, which stays all proceedings in the Court of Appeals case requires the Court of Appeals to certify the original record of the case to the Michigan Supreme Court, and that when certified, that record with this order of the Supreme Court will stand as and for the record of a granted application by the people for leave to review the judgment, whereupon submission of such granted appeal will proceed according to further order or orders. If this point is of importance we might mention that the Supreme Court of this State does in its opinion in this case, attached as an appendix to the petition, cite some of the "guidelines", cases, and statutes available in this State though it also does not specify a series of form questions to be applied to all fact situations.

We agree with Petitioner's statement that Petitioner then made application to the Supreme Court of North Dakota for a Writ of Habeas Corpus on the 6th day of June 1969, the Writ was issued returnable on the 25th day of June 1969, and that pursuant to opinion dated September 24, 1969, the Supreme Court of North Dakota quashed the writ.

ARGUMENT

Petitioner informs us at this point, (Page 7 of his petition), in language somewhat different from his "Questions Presented for Review", (Page 2 of his petition), that the questions presented for review are the effectiveness of the Petitioner's waiver of the right to counsel and the question as to whether his guilty plea was voluntarily made. We feel there is also a factual and procedural problem in this case. We note also that the Petitioner informs us that the North Dakota Supreme Court definitely did not apply Federal standards in considering this case.

As to the factual basis, it would appear to us that Petitioner

expects the North Dakota Burleigh County District Court and the North Dakota Supreme Court to create or assume facts without evidence and in direct contradiction to the facts as shown by the McKenzie County Transcript, such as his contention that the Defendant was confused or did not fully understand the offer of counsel, the offer of a jury trial, that he denied any intent to kill, that he denied any sexual penetration, etc. If Defendant actually did not fully understand or was confused as to these elements, it would seem a simple matter to establish such fact, if such is the fact, by a simple affidavit made as a part of a motion to withdraw his plea of guilty under the very liberal North Dakota Rule, such as was done in the State vs Magrum case, cited supra. Defendant, however has not chosen the route set out in the Magrum case or in the North Dakota statutes on the subject, also cited supra.

Instead, the Petitioner has chosen to proceed by writ of habeas corpus in the State Courts. The District Court of Burleigh County and the North Dakota Supreme Court have considered the entire record of these proceedings, have considered and have applied the case and statutory law presented to it by Petitioner, and have applied the standards set forth therein to the record presented, excepting possibly, of course, the decision in People vs Taylor cited supra, the form questions and statutory background of which had not previously been adopted in this State by either legislative or judicial process.

As pointed out in the petition, the Supreme Court of this State did call attention to Sections 29-01-06, 29-01-27, (now Sections 29-07-01 and 29-07-01.1 of the 1969 Supplement to the North Dakota Century Code), and Section 29-13-03 of the North Dakota Century Code, and various judicial decisions of the Supreme Court of this State in arriving at its conclusion. At this point we would disagree with the context of Petitioner's statement that the North Dakota statutes cited and the North Dakota cases thereafter cited are not the proper tests for determining the effectiveness of a waiver of rights guaranteed by the United States Constitution. Certain somewhat similar rights are granted by these North Dakota statutes and the North Dakota Constitution. Regardless of whether these State rights are also guaranteed by the United States Constitution, it was the responsibility of the Burleigh County District Court and of the North Dakota Supreme Court to grant

Petitioner his rights on these bases if he had not effectively waived his rights thereunder. The Supreme Court of North Dakota did not purport to hold the same tests would necessarily apply to waiver of these rights as would apply to waiver of his Federal rights, but did properly consider, as was their responsibility, whether there had been a wai er or violation of these State rights. In addition to consideration of the application of the waivers of these State rights, the North Dakota Supreme Court did consider whether there were adequate protection of, or waivers of the rights guaranteed the Petitioner under the Federal Constitution. Assuming that the State Supreme and District Courts actually did consider and adequately apply, Petitioner's Federal constitutional rights, it is not of great moment whether the Federal and State rights require application of different or the same standards. However, we are not necessarily convinced by Petitioner's argument that there is a substantial difference between the standards applied under the State Constitution and statutes and the Federal Constitution and statutes.

The Federal cases cited by Petitioner apparently look to the question of whether the guilty plea was "intelligent and voluntary", whether the rejection of the right to counsel was "intelligently and understandingly" made, Boykin vs Alabama ____U.S.____, 23 L. ed 2d 274, 89 S.Ct. ___ (1969). Johnson vs. Zerbst 304 U.S. 458, 82 L. ed 1461, 58 S. Ct. 1019, (cited in the North Dakota Supreme Court decision in this case), appears to require a competent and intelligent waiver by the accused. Carnley vs Cochran 369 U.S. 506, 8 L. ed 2d 70, 82 S. Ct. 884, appears to require that the waiver be intelligent and understanding. Von Moltke vs Gillies, 92 L. ed 309, 332 U.S. 708, 68 S. Ct. 316, would appear to indicate that the waiver of counsel should be "understandingly and wisely made" and that it should be an "intelligent and competent" waiver.

The Supreme Court of the State of North Dakota in previous cases has examined into the question of whether the Petitioner on habeas corpus was deprived of his rights under the Constitution or the laws or the treaties of the United States so that he is entitled to be released from custody. (Fournier vs Roed, 161 N.W. 2d 458, N.D. 1968). It has held that pleas of guilty must be free and voluntary. (State vs Layer, 48 N.D. 366, 184 N.W. 666, State vs Throndson, 49 N.D. 348, 191 N.W. 628). State vs O'Neill, 117 N.W. 2d 857 (N.D. 1962), indicates that waivers of counsel, and pleas of guilty must be freely, knowingly, and un-

derstandingly made. State vs Magrum, (N.D. 1949) 76 N.D. 527, 29 N.W. 2d 358), indicates that pleas of guilty must be freely and understandingly made. State vs Malnourie, 67 N.W. 2d 330 (N.D. 1954), turns basically upon the question of whether the plea of guilty was voluntary and further indicates that the defendant must have actual knowledge of his guilt, to sustain a plea of guilty. State vs Whiteman (N.D. 1954) 67 N.W. 2d 599, a case related in factual situation to State vs Malnourie, discusses the legal aspects of these matters in much more detail, indicating that waiver of counsel must be free and responsible, competent and intelligent, intelligent and understanding. It indicates further that pleas of guilty must be made with complete understanding, freely and understandingly, and considers at some length such decisions as Powell vs Alabama, 287 U.S. 45, 53 S. Ct 55, 77 L. ed 158, 84 A.L.R. 527; Johnson vs Zerbst, 304 U.S. 458, 5 S. Ct 1019, 82 L. ed 1461, 146 A.L.R. 357; and Betts vs Brady, 316 U.S. 455, 62 S. Ct 1252, 86 L. ed. 1595. In addition to the United States Supreme Court decisions cited by the North Dakota Supreme Court in the instant case, each of these North Dakota decisions was considered and cited therein.

On these bases, as well as the bases recited by the North Dakota Supreme Court in the instant case, we must necessarily agree with Petitioner's conclusion that we can look to the long-standing Federal standards to determine the effectiveness of a waiver of the right to counsel and of the plea of guilty, however, we are inclined to disagree with any implication that the State of North Dakota and its Supreme Court is applying standards in the application of Federal Constitutional rights differing in substance from those heretofore applied by the United States Supreme Court.

The Von Moltke vs Gillies decision, (92 L. ed 309, 332 U.S. 708, 68 S. Ct 316), cited by petitioner is interesting, however, like the State vs Malnourie and State vs Whiteman, North Dakota cases previously cited herein would appear to involve elements of actual coercive forces (when considered on the basis of the differences in condition of the Defendants in the respective cases), and are inapplicable to the situation of Petitioner in this instance, there being no evidence or even implication of any use of coercive forces.

We do, of course, contend that the questions asked by the trial court considered in Petitioner's Statement of the Case in proper context as outlined in this brief in opposition or in the full light of the entire McKenzie County Transcript, do con-

stitute a "penetrating and comprehensive examination of all circumstances under which the plea was tendered". The questions and answers quoted in the petition herein standing alone are practically meaningless, however, in proper context we do submit that they show an intelligent and understanding waiver by the accused.

We further contend that the information contained in the McKenzie County Transcript fully shows that the Defendant had the necessary "intent to kill" and had accomplished sufficient sexual penetration. It further discloses apparent knowledge of the Defendant as to the evidence against him to establish these elements of the crimes. While very probably Petitioner is not qualified to write a legal brief on these elements of these crimes, citing appropriate authorities, etc., he had full knowledge of the factual events he did admit and was duly warned of the legal consequences of such factual events.

Petitioner informs us with great emphasis that Defendant was never advised that the maximum punishment for the crime of rape in the first degree could be LIFE IMPRISONMENT. He does not further define that conclusion as indicating whether he refers to life and a day, the rest of his natural life, or merely a long term of years. He does not indicate whether he feels Petitioner should have been told of the distinction between a prison year and a calendar year, the function of the State Pardon Board and the State Parole Board, the element of good time gained by labor, etc. He does not indicate whether such elements as cruel and unusual punishment restrictions on sentencing, customary practices in sentencing, etc., should be included in his requested dissertation on LIFE IMPRISONMENT or not. We cannot help but feel that any statement that rape in the first degree could be punished by LIFE IMPRISONMENT in this State would be in practicality false, if for no other reason, we are familiar with no instance in which such a sentence has been imposed in this State. We do think it is important that while the Defendant does appear throughout the Transcript as intelligent, competent, and understanding, he does not purport to be educated in the law, a college graduate or the like. Too much detail on the more intricate elements of the situation would have only served to confuse him. He was told in practically the words of the statutes the punishment for the crimes charged. He was examined thoroughly as to each element of the crimes charged, and unquestionably was guilty of them. His request, however, was to plead guilty not

to be thoroughly educated in the field of law. The Court must necessarily to some extent accede to the wishes of the Defendant and we cannot help but feel that the Defendant would have been only confused by the addition of too much extraneous material.

We must necessarily agree with Petitioner that Boykin vs Alabama___U.S.____23 L. ed. 2d 274, 89 S. Ct ___(1969), indicates that a plea of guilty involves the waiver of certain Federal constitional rights. We must disagree, however, that Petitioner was questioned only as to the right to a trial by jury and the right to counsel, or that the record is "silent" as to Petitioner's knowledge of the privilege against self-incrimination, the right to confront one's accusers, the right to compulsory process for obtaining witnesses in his favor and other rights guaranteed by the Federal Constitution. There are admittedly problems with a non-legally trained person handling a criminal case, however, the Petitioner had firmly stated that he did not wish counsel. The trial court definitely gave the Petitioner the right to cross-examine the witnesses against him by specifically asking him whether he had any questions to ask of these witnesses, (Pages 37 and 69 McKenzie County Transcript). The Court specifically asked the Defendant whether he objected to certain exhibits, (Pages 68 and 69, McKenzie County Transcript), specifically informed the Petitioner that the medical exhibits could not be received into evidence over his objection. Insofar as there had been no opportunity for cross examination, the Court specifically asked the Defendant whether there were any witnesses he wished to call, (Page 69 McKenzie County Transcript), and specifically asked the Defendant whether he had any legal cause to show why judgment and sentence should not be pronounced, (Page 71, McKenzie County Transcript). In each instance the Defendant's answer was fully in accordance with the position he had previously taken to the effect that he wished to plead guilty and suffer the consequences of his actions without exercising these rights.

Petitioner further states in his petition that the constitutional rights of the Defendant on his preliminary hearings were covered in the printed portion of the return of the County Justice. He objects strenuously to the fact that in addition to the specified rights some of these rights are encompassed within the printed phrase "etc. etc", states that this is a rather cursory way of treating constitutional rights, and con-

siders it unthinkable that a State Supreme Court should rely, even partially, on such a document yet in the immediately preceding paragraph of his printed petition (Pages 10 and 11) he apparently expects the Supreme Court of the United States to place reliance upon his statement specifying certain constitutional rights and including the remainder in his phrase: "and other rights guaranteed by the Federal Constitution". We cannot but hope that this court feels as justified in relying on the "etc. etc." rights determined by the county justice as it does in relying on these "other" rights. Petitioner, however, gives us no other basis for questioning the accuracy of the determination of the county justice, nor does he apparently question that they do constitute positive evidence, a part of the record in this case, that Defendant was granted these rights.

Petitioner concedes that he does not suggest that Halliday vs United States ___U.S.___, 23 L. ed. 2d 16, 89 S. Ct ____requires that Rule No. 11 of the Federal Rules of Criminal Procedure be applied to State cases retroactively. While we appreciate this concession we nevertheless contend the District Court for McKenzie County did not accept the plea of guilty in this instance without first addressing the Defendant personally and determining that the plea was made voluntarily with understanding of the nature of the charge and the consequences of the plea. We further contend that the District Court for McKenzie County did not enter a judgment upon this plea of guilty until it was satisfied that there was a factual basis for the plea. We might add at this point that we feel that the District Court for McKenzie County thoroughly examined into each element of the crimes alleged and in each instance the Petitioner answered knowingly, understandingly and intelligently, proving the existence of the factual basis of such element beyond any doubt. In these circumstances we feel that the District Court of McKenzie County fully complied with the provisions of Rule No. 11 of the Federal Rules of Criminal Procedure though it was not subject to such rule.

Petitioner further points out that the State District Judge presiding at the habeas corpus hearing expressed doubt as to whether the minimum standards for acceptance of a plea of guilty and waiver of counsel had been met. At this point we feel it proper to mention that the State District Court of Burleigh County had full authority to grant the writ of habeas corpus and to release the Petitioner upon such writ but, in

effect, determined that the Petitioner had no basis for such writ or such release. The only error we find in that proceeding is that statement at lines 18 and 19 of Page 18 of the Burleigh County Transcript that:

("155 N.W. 2d 723, In that case the Supreme Court of Michigan")

As we have previously pointed out, the case reported at 155 N.W. 2d 723, is a decision of the Michigan Court of Appeals, not of the Supreme Court of Michigan. The correct citation of the Supreme Court of Michigan decision in regard to that case in People vs Taylor 156 N.W. 2d 793. Also, we might point out that the District Court of Burleigh County at page 18 of the Burleigh County Transcript did not express doubt generally as to whether the minimum standards for acceptance of a plea of guilty and waiver of counsel had been met. What it did state in this respect at page 18 of the Burleigh County Transcript was: ("***there is a serious question as to whether or not the minimum standards, at least as the Michigan court outlined them, were met in this case.")

To conclude the basic argument portion of this brief, in opposition we must necessarily disagree that there was or, in this case could have been any failure of the North Dakota Supreme Court to apply proper constitutonal standards, that this is or could be considered a case where there was not an effective waiver of counsel or an intelligent and well-informed guilty plea.

In so far as we have to this point, at Petitioner's behest, considered at some length the deliberations of the Burleigh County District Court, we would like to take the liberty of expanding on a statement of the trial court. We note at page 71, McKenzie County Transcript, the statement of the Court that:

"Well, we're not here to punish the Fischers."

(The Fischers, of course, were the people injured by the crimes charged.)

Section 12-28-14 of the North Dakota Century Code provides:

"12-28-14. SLANDER OF FEMALES-MISDEMEANOR.—A person who, in the presence and hearing of a person other than the female slandered, whether such female is present or not, maliciously speaks of or concerning any female of the age of twelve years or upwards, not a public prostitute, any false and defamatory words or language injuring

or impairing the reputation of such female for virtue or chastity, is guilty of a misdemeanor."

Possibly, since the advent of the Kinsey report, it could be contended that the chastity of females is no longer of such great importance, and unquestionably the quoted statute does not apply to a female of the tender years of the victim in this instance. Neverthless, it seems an unfortunate result if the final result of all the legal proceedings here concerned would be that the reputation of the victim for chastity would be forever impaired by the records of the McKenzie County District Court, but that the Petitioner, who actually did furnish or allow to be furnished by failure to object to relevant evidence, the information on that record would be held completely irresponsible for the actions therein set forth. It would seem a much better result, and one more in keeping with the usual social standard, that one wishing to escape responsibility for his sexual exploits be required to at least deny such exploits. On such basis we would again recommend that if Petitioner does wish to rely on questioning the validity of his plea of guilty rather than on the mercies of the State Board of Pardons and Paroles, that he utilize the standard North Dakota procedure of moving to withdraw his plea of guilty, furnish the necessary evidentiary material appropriate to such motion, and allow the record to be cleared if he is to be held irresponsible for these activities.

On this basis, again we differ with Petitioner as to the propriety of the use of the writ of certiorari or the writ of habeas corpus to question the validity of the trial court proceedings.

Dated this ___ day of January, 1970, at Bismarck, North Dakota.

Respectfully submitted,

By: HELGI JOHANNESON
ATTORNEY GENERAL,
STATE OF NORTH DAKOTA

JOHN E. ADAMS
ASSISTANT ATTORNEY GENERAL,
OF THE STATE OF NORTH
DAKOTA ATTORNEY FOR
RESPONDENTS